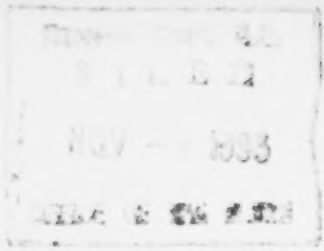
93-775



Case No. _____

In The
SUPREME COURT of the UNITED STATES

October Term, 1993

==========

HARLINE K. GEORGE, et al.,

Petitioner,

v.

LEONARD ZLOTOFF and
LOIS ZLOTOFF,

Respondents.

==========

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

==========

RICHARD D. PROCHAZKA
A Professional Corporation

Richard D. Prochazka*
Marilynn Mika Spencer
5333 Mission Center Road
Suite 220
San Diego, CA 92108
(619) 296-7677

Attorneys for Petitioner

*Counsel of Record
November, 1993

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Question Presented for Review:

Is A Creditor's State Court Enforcement Of A "Pay All Bills" Provision In A Corporate Stock Sales Agreement Preempted By The National Labor Relations Act?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW . .	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED . .	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT . .	10
A. The Decision Appealed From Conflicts With United States Supreme Court Decisions On NLRB Preemption	11
B. The Issue Was One Of First Impression In The California Courts	17
C. This Court's Decision Is Necessary To Secure Consistency With U.S. Supreme Court Decisions . . .	18
D. There Are No Policy Reasons To Assign Contract Interpretation To The NLRB As The Board Has No Expertise In That Area . . .	26
CONCLUSION	29

INDEX TO APPENDICES

Page

Appendix A. Opinion of the Court of Appeal, Fourth Appellate District A-1

Appendix B. Opinion of the Superior Court for the State of California, San Diego County . . . B-1

Appendix C. Relevant Provisions of Section 29, United States Code:

§152 . . . . . C-1
§157 . . . . . C-4
§158 . . . . . C-5
§160 . . . . . C-7
§185 . . . . . C-9

TABLE OF AUTHORITIES

Page

Cases

Atkinson v. Sinclair Refining Company
370 U.S. 238 (1962) 21, 22

Automobile Workers v. Russell
356 U.S. 634 (1958) 13

Bowen v. U.S. Postal Service
459 U.S. 212 (1983) 25

Breininger v. Sheet Metal Workers Local 6
493 U.S. 67 (1989) 25

Dowd Box Company v. Courtney
368 U.S. 502 (1962) 21

Farmer v. United Brotherhood of Carpenters, Local 25
430 U.S. 290 (1977) 13

Linn v. Plant Guard Workers
383 U.S. 53 (1966) 13

Machinists v. Gonzales
356 U.S. 617 (1958) 13

National Labor Relations Board v. C & C Plywood Corporation
385 U.S. 421
(1967) 26, 27, 28

San Diego Building Trades Council v. Garmon
359 U.S. 236
(1958) . . 11, 12, 14, 15, 20, 21, 22

Page

San Diego AFL-CIO Bus Drivers Local Division 1309 of the Amalgamated Transit Union v. National Labor Relations Board
Case No. 88-1533
(D.C. Cir. 1989) 5

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters
436 U.S. 180 (1978) 12

Smith v. Evening News Association
371 U.S. 195
(1962) 12, 21, 22, 23

Teamsters v. Lucas Flour
369 U.S. 95 (1962) 21, 22

Vaca v. Sipes
386 U.S. 171
(1967) 23, 24, 25

Page

Statutes

28 U.S.C. §1257(a). 3

Labor-Management Relations Act of 1947, as amended (29 U.S.C. §§141-197)

29 U.S.C. §185(a) (Section 301 (a)) 4, 21

National Labor Relations Act, as amended (29 U.S.C. §§151-169)

29 U.S.C. §152 (Section 2) 3, 4, 15
29 U.S.C. §157 (Section 7) 3, 4, 11, 14
29 U.S.C. §158(a) (Section 8(a)) 3, 4, 11, 14
29 U.S.C. §160(a) (Section 10(a)) 3, 4
29 U.S.C. §160(b) (Section 10(b)) 3, 4

Case No. _____

In The
SUPREME COURT of the UNITED STATES

October Term, 1993

==========

HARLINE K. GEORGE, et al.,

Petitioner,

v.

LEONARD ZLOTOFF and
LOIS ZLOTOFF,

Respondents.

==========

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

==========

Harline K. George, now known as Harline K. Prochazka (hereinafter referred to as "George" or "Petitioner") respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, Fourth

Appellate District, Division One, entered in this proceeding on May 12, 1993.

OPINIONS BELOW

The Supreme Court of the State of California denied George's Petition for Review on August 11, 1993. The Opinion of the California Court of Appeal, Fourth Appellate District, Division One, is neither officially nor unofficially reported; the Opinion is set forth in full in Appendix "A" to this Petition. The Order And Judgment On Defendants' Motion For Judgment On The Pleadings of the Superior Court, San Diego County, is neither officially nor unofficially reported, and is set forth in full in Appendix "B" to this Petition.

JURISDICTION

On May 12, 1993, the California Court of Appeal entered its decision affirming

the Judgment and Order of the Superior Court of the State of California, in and for the County of San Diego. On August 11, 1993, the Supreme Court of the State of California denied George's Petition for Review. The California Supreme Court's denial of George's Petition for Review was, in effect, an affirmation of the decision of the Court of Appeal. As the Court of Appeal was the highest court to issue a written decision, this Petition, by its title, seeks a writ of certiorari to the California Court of Appeal. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 USC §1257(a).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are:

A. The National Labor Relations Act, as amended, Sections 2, 7, 8(a), 10(a),

and 10(b) (respectively, 29 U.S.C. §§ 152, 157, 158(a), 160(a) and 160(b)).

B. The Labor Management Relations Act, as amended, Section 301(a) (29 U.S.C. § 185(a)).

These provisions are set forth in full in Appendix "C" hereto.

STATEMENT OF THE CASE

In August of 1980, the employees of Aztec Bus Lines, Inc. went on strike. One of these employees was Petitioner George. After seven months on strike, the employees made an unconditional offer to return to work. The corporation, Aztec Bus Lines, Inc., refused to reinstate any of the employees, including George.

An Administrative Law Judge of the National Labor Relations Board (hereinafter "NLRB") determined that Aztec Bus Lines, Inc.'s refusal to reinstate George was an unfair labor practice. The

resulting Order included a mandate to Aztec Bus Lines, Inc. to reinstate George with full backpay and benefits. That Order was confirmed by the NLRB on July 22, 1988.

That NLRB Order was confirmed by the United States Court of Appeals, District of Columbia Circuit, in San Diego AFL-CIO Bus Drivers Local Division 1309 of the Amalgamated Transit Union v. National Labor Relations Board, Case No. 88-1533 (D.C. Cir. 1989) (before: Mikva, Edwards and Ruth B. Ginsburg, Circuit Judges).

At the end of 1986, Leonard Zlotoff and Lois Zlotoff ("Zlotoffs" or "Respondents") owned virtually all of the corporate stock of Aztec Bus Lines, Inc. At that time, the Zlotoffs entered into a stock purchase agreement with James V. Pike. That agreement provided that the Zlotoffs, as sellers of corporate stock, would be personally liable for all of the

then-existing liabilities of Aztec Bus Lines, Inc. The relevant contractual provision stated in full: "It is the intent of the parties that Seller [the Respondent] bear the liabilities existing as of December 31, 1986, and buyer [Pike] bears the risk of operations thereafter." (Complaint for Damages and Breach of Contract, filed on December 28, 1990.) The obvious intent of that provision was that Pike would purchase the corporation free and clear of any previous debt.

On or about March 20, 1990, Aztec Bus Lines, Inc. ceased to exist; Aztec Bus Lines, Inc. effected an Assignment for the Benefit of Creditors, which, in California, is tantamount to a liquidation under a Chapter 7 bankruptcy.

When George received notification of the Assignment for Benefit of Creditors, it became clear that there was no longer any hope that Aztec Bus Lines, Inc. would,

or could, act on the NLRB Order to reinstate her with backpay and benefits.

Subsequently, on December 28, 1990, Petitioner George sued the Respondents (the Zlotoffs) for breach of their stock purchase agreement with Pike, under a third party beneficiary theory. George alleged that Aztec Bus Lines, Inc. was indebted to her for backpay and benefits through December 31, 1986 pursuant to the reinstatement order of the NLRB as confirmed by the U.S. Court of Appeals, D.C. Circuit. George's complaint further alleged that Aztec Bus Lines, Inc. was indebted to George at the time of the Zlotoffs' stock purchase agreement with Pike. George also alleged that when the Zlotoffs agreed to pay all of Aztec Bus Lines, Inc.'s corporate debts, that pool of debts included the corporation's financial obligation to George, through December 31, 1986.

The Zlotoffs' liability to George terminated as of December 31, 1986 because the Zlotoffs' stock purchase agreement with Pike cut off their liability as of that date. Thus, George did not seek damages in her complaint beyond the date specified in the stock purchase agreement.

Moreover, George did not seek reinstatement from the Zlotoffs, or from any other party or entity, for the NLRB had previously determined there was no successor employer to Aztec Bus Lines, Inc. in NLRB Case No. 21-CA-27670.

Subsequent to Petitioner George's complaint, the Respondents filed an answer which did not raise federal preemption as an affirmative defense. The Respondents subsequently moved the superior court for judgment on the pleadings, on the sole ground that George's complaint to enforce the stock purchase agreement between investors was preempted by the NLRB. The

superior court accepted the Respondents' assertion and granted their motion for judgment on the pleadings; the court's Order and Judgment thereon was filed on January 6, 1992.

The Order and Judgment stated, in relevant part, "Motion for Judgment on the Pleadings granted without leave to amend as Court finds the present action is arguably within the jurisdiction of the National Labor Relations Board."

Petitioner George filed a Notice of Appeal on March 5, 1992. After briefing and oral argument by the parties, the court of appeal affirmed the superior court judgment, by a decision filed May 12, 1993. The court stated its conclusion that:

> The preemption doctrine of San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. 236, applies to conduct or activity which is arguably protected or arguably prohibited by the NLRA. The preemption doctrine applies to George's

> complaint because her lawsuit essentially seeks enforcement of an NLRB order, a matter governed by the NLRA. Thus, the superior court properly concluded George's complaint was preempted as arguably within the jurisdiction of the NLRB. The superior court correctly granted judgment on the pleadings favoring Zlotoff.

Decision of the Court of Appeal, p. 16-17 (Appendix A-16 through A-17 hereto).

This decision of the court of appeal represents a conflict with decisions of this United States Supreme Court, as there is no federal preemption of a creditor's state court enforcement of a stock purchase agreement under the circumstances of this case. Accordingly, George now brings this petition for certiorari.

REASONS FOR GRANTING THE WRIT

Our system of federalism mandates that local governments maintain control over local affairs, and that our federal government refrain from unwarranted interference in those local affairs. It

is only under limited and specific circumstances that the federal system will preempt a local concern. Those circumstances do not exist in the present case for the reasons advanced below.

A. The Decision Appealed From Conflicts With United States Supreme Court Decisions On NLRB Preemption.

This Supreme Court expressed its NLRB preemption doctrine in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1958) as follows:

> When an activity is arguably subject to §7 and §8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Id. at 245, referencing 29 U.S.C. §157 and §158, respectively.

By its language, the Garmon preemption doctrine applies only to state

or federal court efforts to regulate activity, or conduct, when that conduct is arguably protected or prohibited by the National Labor Relations Act ("NLRA"). Further, not all activity or conduct that fits into the "arguably protected or prohibited" category is preempted -- subsequent Supreme Court case law has shown that the courts may in fact regulate some such activity or conduct, under an ever-growing set of circumstances.

Just as the Garmon preemption doctrine applies only to matters which involve activity or conduct, Garmon does not apply to other areas, such as the contractual breach at issue in Petitioner George's complaint.

This Court has held that state courts may continue to regulate matters of vital public importance, even if those matters peripherally touch on federal law. E.g. Sears, Roebuck & Co. v. San Diego County

District Council of Carpenters, 436 U.S. 180, (1978) (state claim of trespass not preempted); Farmer v. United Brotherhood of Carpenters, Local 25, 430 U.S. 290 (1977) (no preemption of several tort claims); Linn v. Plant Guard Workers, 383 U.S. 53 (1966) (malicious libel not preempted); Automobile Workers v. Russell, 356 U.S. 634 (1958) (mass picketing and threats of violence not preempted); Machinists v. Gonzales, 356 U.S. 617 (1958) (no preemption of wrongful expulsion from union meeting).

Thus, the NLRB does not automatically preempt any case which has a remote connection to the NLRA. In particular, for the NLRB to preempt the instant case, there would have to be a "Yes" answer to the following question: Is the breach of a stock purchase agreement between investors arguably protected or arguably prohibited by the NLRA?

Posing this question reveals that Garmon does not apply to the breach of a sales contract, nor could it -- for the simple reason that there is no activity involved within the meaning of Garmon. Moreover, as the NLRB would only have jurisdiction over labor organizations and employers (not investors), the NLRB could not assert jurisdiction over George's complaint because Aztec Bus Lines, Inc. no longer exists and there is no successor employer. Thus, the NLRB has no power to determine the issues in George's complaint.

The NLRB has clearly defined and explicitly limited jurisdiction. It has power only to enforce the National Labor Relations Act, specifically §7 and §8 of that Act (29 U.S.C. §157 and §158, respectively); it does not have the power to enforce stock purchase agreements between investors. Primarily, the NLRB

enforces the law with respect to the relationship between labor unions and employers engaged in interstate commerce (29 U.S.C. §152). This limited NLRB jurisdiction does not stretch to include the power to enforce or even analyze a stock purchase agreement between investors.

There is a clear policy behind NLRB preemption of courts' efforts to regulate conduct between unions and employers. That policy, as stated in Garmon, supra, is to avoid state interference with national policy.

However, there is absolutely no potential for a state court decision to conflict with an NLRB decision, because Aztec Bus Lines, Inc. is now non-existent and there is no successor employer.

Moreover, there is no possibility that a state court decision could conflict with NLRB law or policy, as George's

complaint did not seek to compel anything other than the payment of money, and only for the period covered by the stock purchase agreement: there was no conduct involved whatsoever; George did not ask for reinstatement; George did not ask for damages beyond the cut-off date of the Zlotoffs' obligation in the stock purchase agreement. Clearly, then, George did not seek enforcement of the NLRB Order, for that would have entailed a much broader remedy, including reinstatement, restoration of seniority rights, and continuing backpay.

Further, even if the breach of a stock purchase agreement could somehow be characterized as having a remote relationship to the NLRA, any such relationship would be completely peripheral and thus not subject to preemption.

Accordingly, the lower court's

decision that the NLRB preempted George's state court breach of contract complaint was in conflict with U.S. Supreme Court authority.

B. **The Issue Was One Of First Impression In The California Courts.**

The issue presented to the California courts appears to have been one of first impression. Petitioner George undertook an extensive search of state and federal law in an effort to locate any authority for the proposition that a stock purchase agreement between investors would or would not implicate questions of federal labor law. That search did not reveal even one case where this issue was presented to a state court, a federal court or to the NLRB.

Presumably, the Respondents were also unable to locate any such case law, as they did not cite to any relevant

authority in the state court proceedings.

Moreover, neither the court of appeal nor the superior court cited to any authority on this precise question. In fact, the decision of the California court of appeal did not address at all the fact that the NLRB would have no jurisdiction to enforce a stock purchase agreement between investors. It appears that the appellate court relied solely on the cases cited by the Respondents, all of which were inapposite as they pertained to employers -- but not investors.

It thus appears that this issue was one of first impression for the courts.

C. **This Court's Decision Is Necessary To Secure Consistency With U.S. Supreme Court Decisions.**

Due to the complete absence of any case law on the issue of NLRB preemption of the enforcement of stock purchase

agreements, this Court's decisions on parallel issues have particular significance. The ample case law on parallel questions has found more and more areas are not preempted by the NLRB.

The most directly related Supreme Court cases are those involving employment contracts, labor organizations, employers, and unfair labor practices. Reference to these employment cases is particularly useful, for if employment cases are not preempted, then surely Petitioner George's complaint to enforce a stock purchase agreement between investors should not be preempted.

In Smith v. Evening News Association, 371 U.S. 195 (1962), Smith sued his employer, the Evening News Association, on behalf of himself and 49 other similarly situated employees. Smith's suit was for breach of contract, brought in the [state] circuit court of Wayne County, Michigan.

Smith's complaint alleged, inter alia, that the employer violated a clause in the collective bargaining agreement between the employer and the Newspaper Guild of Detroit, which provided: "There shall be no discrimination against any employee because of his membership or activity in the Guild."

The respondent employer moved to dismiss the breach of contract complaint for lack of jurisdiction on the ground that the allegations of the complaint, if true, would constitute an unfair labor practice under the Labor Management Relations Act ("LMRA"). The State Court sustained the employer's motion to dismiss and agreed that the subject matter was within the exclusive jurisdiction of the NLRB. Id. at 196.

The Michigan State Supreme Court affirmed the trial court's dismissal, relying upon the Garmon preemption rule.

The United States Supreme Court granted certiorari. In its Evening News decision, this Honorable Court referenced its prior decisions in Teamsters v. Lucas Flour, 369 U.S. 95 (1962), Dowd Box Company v. Courtney, 368 U.S. 502 (1962) and Atkinson v. Sinclair Refining Company, 370 U.S. 238 (1962). Each of these cases recognized the jurisdiction of courts, as opposed to the NLRB, to enforce collective bargaining agreements, even when the action allegedly violating the agreement might also be an unfair labor practice.

The three cases referenced by this Court in Evening News, Lucas Flour, Dowd Box, and Atkinson, were suits upon collective bargaining agreements which were brought, or held to arise, under the Labor Management Relations Act, Section 301(a), 29 U.S.C. §185(a) (hereinafter "Section 301"). In each case, the jurisdiction of the courts was sustained

even though the conduct involved was arguably protected or prohibited by the LRMA. Moreover, in Lucas Flour, as well as in Atkinson, this Supreme Court noted its previous refusal to apply the Garmon preemption doctrine in a wide variety of circumstances. Evening News, supra, at 371 U.S. 197-198.

In Evening News, after this Court conducted the above review of its own decisions, it once again refused to hold that the Garmon preemption doctrine prevented a court from enforcing a contract; Garmon would not apply even "where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board," as well as a breach of a contract. Evening News, supra, at 371 U.S. 197 (emphasis added).

Further, "The authority of the Board

to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301." Id. at 197 (emphasis added).

Smith v. Evening News does not stand alone. In Vaca v. Sipes, 386 U.S. 171 (1967), this Court recognized the primacy of the courts, and not the NLRB, in interpreting agreements:

> There are also some intensely practical considerations which foreclose pre-emption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under L.M.R.A. §301 charging an employer with a breach of contract. . . . If an employee is discharged without

> cause, either the union or the employee may sue the employer under L.M.R.A. §301. Under this section, courts have jurisdiction over suits to enforce collective bargaining agreements even though the conduct of the employer which is challenged as a breach of contract is also arguably an unfair labor practice within the jurisdiction of the NLRB. Garmon and like cases have no application to §301 suits. Smith v. Evening News Assn., 371 U.S. 195, 51 LRRM 2646.

Vaca v. Sipes, 386 U.S. 171, 183-184 (1967). (emphasis added)

And, again, this Court in Vaca stated:

> Moreover, the Board would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employees without remedies for the union's wrong. (footnote omitted) Given the strong reasons for not pre-empting duty of fair representation suits in general, and the fact that the courts in many section 301 suits must adjudicate whether the union has breached its duty, we conclude that the courts may also fashion remedies for such a breach of duty.

Vaca v. Sipes, supra, 187-188 (emphasis added).

The Supreme Court has not backed away from its insistance that the enforcement of contracts is the exclusive province of the courts. In Breininger v. Sheet Metal Workers Local 6, 493 U.S. 67 (1989), this Court affirmed its Vaca holding. Simultaneously, in Breininger, this Court reemphasized its earlier decision in Bowen v. U.S. Postal Service, 459 U.S. 212, 222 (1983), citing itself for the proposition that the right of the individual employee to be made whole is "[o]f paramount importance." 493 U.S. 75.

Thus, even in cases directly involving the employment relationship, and even when the conduct at issue is concededly an unfair labor practice, this Court has not found reason to require NLRB preemption to prevent the courts from enforcing a contract. Enforcing contracts is, absolutely, a judicial function.

Petitioner George's cause of action in the court below should have been allowed to proceed.

D. There Are No Policy Reasons To Assign Contract Interpretation To The NLRB As The Board Has No Expertise In That Area.

Case law reveals that the NLRB has no particular expertise in interpreting contracts -- even if the contract at issue is a collective bargaining agreement (unlike the stock purchase agreement at issue in the instant case). In fact, the U.S. Supreme Court has repeatedly reviewed the NLRB's lack of expertise and lack of jurisdiction to enforce contracts.

One such case is National Labor Relations Board v. C & C Plywood Corporation, 385 U.S. 421 (1967). In C & C Plywood, the United States Supreme Court considered whether the NLRB had

jurisdiction over a union's charge that an employer violated the collective bargaining agreement and committed an unfair labor practice by unilaterally instituting a premium pay plan.

The employer in C & C Plywood argued that the NLRB could not, under any circumstances, analyze a collective bargaining agreement. According to that employer, the Board's authority was strictly limited to determining whether an unfair labor practice had occurred.

This Supreme Court expressly noted that in the case then before it, the NLRB had not had to construe the terms of the labor agreement to determine the respective contractual rights at issue, so the Board had not imposed its own view of the terms and conditions of the labor agreement. All the Board did was:

> merely enforce a statutory right which Congress considered necessary to allow labor and

> management to get on with the process of reaching fair terms and conditions of employment . . . . The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up those statutory safeguards. Thus, the Board, in necessarily construing a labor agreement to decide this unfair practice case, has not exceeded the jurisdiction laid out for it by Congress.

C & C Plywood, supra, at 385 U.S. 428

Thus, even when the NLRB considers the terms of a collective bargaining agreement, it has no power to interpret those provisions; accordingly, it does not, and cannot, develop expertise in that area.

In C & C Plywood, this Court agreed with the employer that contract interpretation was not a matter for the NLRB. By the same analysis, Petitioner George's state court complaint would not have been appropriate for the NLRB, since it involved interpreting a stock purchase agreement under California law.

CONCLUSION

For all of the reasons advanced above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD D. PROCHAZKA,
A Professional Corporation

Richard D. Prochazka*
Marilynn Mika Spencer
5333 Mission Center Road
Suite 220
San Diego, CA 92108
(619) 296-7677

Attorneys for Petitioner

*Counsel of Record

APPENDICES

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HARLINE K. GEORGE,

Plaintiff and Appellant,

v.

LEONARD ZLOTOFF et al.,

Defendants and Respondents.

No. D016457

(Super. Ct. No. 632268)

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. O'Neill, Judge. Affirmed.

Plaintiff Harline K. George appeals a judgment on the pleadings favoring Leonard Zlotoff and Lois Zlotoff (together Zlotloff) on George's complaint for breach of contract. George contends the superior court erred in determining the National

Labor Relations Act (NLRA) (29 U.S.C. §151 et seq.) preempted George's lawsuit. We affirm the judgment.

I

FACTS

In September 1979 Augustus Zemba bought the stock of Aztec Bus Lines, Inc., from Zlotoff under an installment sales contract. After the sale, Zlotoff continued as a director of Aztec and received regular contractual payments from Zemba. Zlotoff continued to own the real property where Aztec's bus yard was located and leased the premises to Zemba. Zlotoff also retained an interest in some of Aztec's rolling stock.

George worked as a bus driver for Aztec. For collective bargaining purposes, Bus Drivers Local Division 1309 of the Amalgamated Transit Union, AFL-CIO (Union), represented George.

On August 23, 1980, Aztec employees

including George went on strike.

In April 1981 George and other striking employees offered unconditionally to return to work.

On September 30, 1982, a National Labor Relations Board (NLRB) administrative law judge found Aztec violated sections 8(a)(1) and 8(a)(3) of the NLRA by not reinstating George and others. The decision ordered Aztec to reinstate George and others with pack pay and benefits from April 4, 1981, until reinstatement. The matter was then transferred to and continued before the NLRB in Washington, D.C.

Meanwhile, Aztec did not reinstate George to her position as bus driver or pay her back wages or fringe benefits.

When Zemba defaulted on installment payments, Zlotoff regained Aztec.

On December 31, 1986, Zlotoff owned 900 of Aztec's 1,000 common stock shares.

Zlotoff agreed in writing to sell those shares to James Pike. The stock purchase agreement provided in part: "It is the intent of the parties that Seller [Zlotoff] bear the liabilities existing as of December 31, 1986, and Buyer [Pike] bears the risk of operations thereafter."

On July 22, 1988, the NLRB affirmed the portion of the administrative law judge's 1982 decision ordering Aztec to reinstate George with back pay.

On July 27, 1989, the United States Court of Appeals for the District of Columbia Circuit confirmed the NLRB award.

On September 12, 1989, the United States District Court for the Southern District of California entered judgment favoring the Union against Aztec requiring compliance with orders of the NLRB including reinstatement and back pay.

On March 20, 1990, Aztec effected an assignment for the benefit of creditors

through the Hamer Group as assignee. The Hamer Group advised creditors that because sums due to Aztec's secured creditors exceeded the value of Aztec's assets there were no funds to pay any sums due under the NLRB award.

On August 16, 1990, the Union filed with the NLRB an unfair labor practice charge against Zlotoff, Pike, and Starline Sightseeing Tours, Inc. (Starline) -- asserted by the Union to be Aztec's "successor employer group" -- alleging discrimination with respect to the terms and conditions of employment of striking employees ordered reinstated under the NLRB's 1982 and 1988 decisions. The Union's counsel enclosed a cover letter asserting Pike allegedly "returned" Aztec to Zlotoff less than six months earlier. Counsel also asserted: "Under the circumstances, Local 1309 believes that, at least for purposes of remedying Aztec

Bus Lines Inc.'s unfair labor practices, the individuals named as employer are either a continuation of Aztec Bus Lines, successor employers, or both and obligated to remedy Aztec Bus Lines Inc.'s unfair labor practices." In asking the NLRB to consider issuing investigative subpoenas to Zlotoff, Starline and Pike, counsel stated: "We recognize that the Board does not frequently issue investigative subpoenas. However, given the nature and duration of Aztec's unfair labor practices, their adherence to a total disregard of the National Labor Relations Act during the period that they were owned by Pike, and the alleged return of the stock in Aztec by Pike to Zlotoff, and the provisions in the Buy-Sell Agreement under which Mr. Zlotoff and his wife became personally responsible for the debts of Aztec as of December 31, 1986, we think investigative subpoenas are in order."

On September 6, 1990, in declining to issue a complaint on the unfair labor charge filed by the Union, the NLRB's acting regional director wrote: "As a result of the investigation, it does not appear that further proceedings on the charge are warranted. The investigation revealed insufficient evidence to conclude that Starline Tours, Inc., Leonard Zlotoff, Lois Zlotoff, and James A. Pike, or any of them, constitute an alter [ego] or disguised continuation of Aztec Bus Lines, Inc."

Despite demand by George, Zlotoff did not pay her any back wages.

II

SUPERIOR COURT PROCEEDINGS

A

GEORGE'S COMPLAINT

In December 1990 George sued Zlotoff for for breach of contract on a third party beneficiary theory. George alleged

when Zlotoff sold Aztec to Pike and assumed all liabilities as of December 31, 1986, Aztec's liabilities included George's back pay award. George's complaint sought $200,000 compensatory damages for wges, fringe benefits, and interest from April 4, 1981, to December 31, 1986.

B

ZLOTOFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

In November 1991 Zlotoff sought judgment on the pleadings, asserting George's complaint was preempted by federal labor law and the NLRB's exclusive jurisdiction.

After judicially noticing various documents involving the NLRB matters, the superior court granted judgment on the pleadings without leave to amend.[1] The court concluded "the present action is arguably within the jurisdiction of the

National Labor Relations Board." The court entered judgment favoring Zlotoff against George. George appeals.

---

1 Generally a motion for judgment on the pleadings is confined to the face of the attacked pleadings. (Baillargeon v. Department of Water & Power (1977) 69 Cal.App.3d 670, 675-676.) However, a court deciding a motion for judgment on the pleadings may also consider -- in addition to the pleaded facts -- any matters properly subject to judicial notice. (Id. at p. 676; Sebago, Inc. v. City of Alameda (1989) 211 Cal.App.3d 1372, 1380.)

III

DISCUSSION

George frames the issue as whether the NLRA preempts her complaint for Zlotoff's alleged breach of his stock purchase agreement with Pike. Asserting her complaint does not raise any issues within the NLRB's jurisdiction or otherwise require the state courts to invade the province of federal labor law, George contends the superior court erred

in granting judgment on the pleadings on the ground of preemption. George asserts one of Aztec's existing liabilities Zlotoff assumed under the 1986 stock purchase agreement was the NLRB's 1982 order that Aztec pay her back wages and fringe benefits. George asserts she seeks only to enforce her third party beneficiary rights under California law arising from that stock purchase agreement. We conclude the judgment on the pleadings must be affirmed because the superior court properly concluded the NLRA preempted George's complaint.

A

THE LAW

The NLRB "'has exclusive jurisdiction to prevent and remedy unfair labor practices by employers and unions.' [Citation.]" (Hobbs v. Hawkins (5th Cir. 1992) 968 F.2d 471, 478-479.) "In the NLRA, Congress established a

'comprehensive amalgam of substantive law and regulatory arrangements . . . to govern labor-management relations affecting interstate commerce.' [Citation.] A critical element of that amalgam is the NLRB's primary jurisdiction in interpreting and enforcing federal labor law. [Citation.]" (Richardson v. Kruchko & Fries (4th Cir. 1922) 966 F.2d 153, 155.

Sections 7 and 8 of the NLRA "govern both protected 'concerted activities' and unfair labor practices. They regulate the vital, economic instruments of the strike and the picket line, and impinge on the clash of the still unsettled claims between employers and labor unions." (San Diego Building Trades Council, etc. v. Garmon (1959) 359 U.S. 236, 241; 29 U.S.C. §§ 152, 157, 158.) "When it is clear or may fairly be assumed that the activities which a State purports to regulate are

protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." (San Diego Building Trades Council, etc. Garmon, supra, 359 U.S. at p. 244, fn. omitted.)

"When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. at p. 245.) Thus, "where the activity which is the subject of suit is either arguably prohibited or arguably protected by the NLRA, state court jurisdiction must yield to the exclusive jurisdiction of the NLRB. [Citation.]" (Machinists Automotive Trades Dist. Lodge v. Peterbilt Motors Co. (1990) 220 Cal.App.3d 1402, 1407.)[2]

---

[2] "In determining the extent to which state regulation must yield to subordinating federal authority, . . . the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own

procedures, and equipped with its specialized knowledge and cumulative experience . . . ." (San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. at pp. 241-243.) "[J]udicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting." (Id. at p. 243, fn. omitted.)

"At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." (San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. at pp. 244-245.)

Our task is to look at the

controversy presented to the superior court and ask whether the NLRB could have adjudicated it instead. (Hobbs v. Hawkins, supra, 968 F.2d at p. 477.) "[W]hen the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." (Sears, Roebuck & Co. v. Carpenters (1978) 436 U.S. 180, 202.) Where the state court claim is a claim that was or could have been brought before the NLRB, such claim is preempted. (Parker v. Connors Steel Co. (11th Cir. 1988) 855 F.2d 1510, 1516-1517.) "The basic rule is that, if the conduct that tne state seeks to regulate is 'actually or arguably' protected under NLRA § 7 or prohibited by NLRA § 8, then 'otherwise applicable state law and procedures are ordinarily pre-empted.' [Citation.]" (Richardson v. Kruchko & Fries, supra, 966 F.2d at p. 156.)

ANALYSIS

Zlotoff had the burden to demonstrate George's lawsuit was preempted by federal law. (Machinists Automotive Trades Dist. Lodge v. Peterbilt Motors Co., supra, 220 Cal.App.3d at p. 1407.) "However, the burden [was] not onerous, since it only" required Zlotoff to "show the claims in issue were 'arguably' subject to exclusive NLRB jurisdiction. [Citation.]" (Id. at pp. 1407-1408.) This record discloses Zlotoff met that burden. Thus, the superior court correctly concluded the NLRA preempted George's complaint.

1

Generally the remedying of unfair labor practices is an administrative -- not judicial -- function given to the NLRB's sole discretion. (National Labor Relations Bd. v. Seven-Up Bottling Co. (1953) 344 U.S. 344, 346.) In enacting the NLRA, Congress invested the "Board and

not the courts with broad powers to fashion remedies that will effectuate national labor policy." (NLRB v. Food Store Employees (1974) 417 U.S. 1, 10.) The NLRB has exclusive jurisdiction over enforcement of its own orders. (Amalgamated Utility Workers v. Consol. Edison Co. (1940) 309 U.S. 261, 265-266; Solo Cup Company v. N.L.R.B. (4th Cir. 1964) 332 F.2d 447, 449; National Labor Relations Bd. v. Sunshine Mining Co. (9th Cir. 1942) 125 F.2d 757, 761.) "If the NLRB is exclusively responsible for redressing unfair labor practices, which it is, this must necessarily include ensuring that the remedy prescribed is administered to its conclusion." (N.L.R.B. v. State of Ill. Dept. of Employment Sec. (N.D. Ill. 1991) 777 F.Supp. 1416, 1419.) ". . . 'Because the relation of remedy to policy is peculiarly a matter for administrative competence,

courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.'" (National Labor Relations Board v. Gullett Gin Co. (1951) 340 U.S. 361, 363, quoting Phelps Dodge Corp. v. National Labor Relations Bd. (1941) 313 U.S. 177, 194.)

George contends her complaint was not preempted because it assertedly sought damages only for Zlotoff's alleged breach of his stock purchase agreement with Pike. However, George could not avoid preemption simply by framing her lawsuit as a state breach of contract action. (Richardson v. Kruchdo & Fries, supra, 966 F.2d at p. 158.)[3]

---

[3] "The Supreme Court has emphasized that mere labels are not relevant in the labor preemption context; rather, labor

preemption is '"concern[ed] . . . with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered."' [Citations.]"
(Richardson v. Kruchko & Fries, supra, 966 F.2d at p. 158, italics in original; see also Motor Coach Employees v. Lockridge (1971) 403 U.S. 274, 292; Parker v. Connors Steel Co., supra, 855 F.2d at pp. 1516-1518.) In Machinists Automotive Trades Dist. Lodge v. Peterbilt Motors Co., supra, 220 Cal.App.3d 1402, the appellate court stated: "Even though appellants might attempt to recast this misconduct as a breach of contract, it remains within the NLRB's exclusive jurisdiction." (Id. at p. 1412.)

Although cast as a complaint for Zlotoff's asserted breach of his promise under the stock purchase agreement, the liability George sought to enforce was Zlotoff's promise to satisfy Aztec's obligation to George under the NLRB order. Thus, to prevail on her complaint George would be required to prove the existence, continuing validity and enforceability of the NLRB order. Those issues bearing on enforcement of the NLRB order were within the NLRB's exclusive jurisdiction.

(National Labor Relations Bd. v. Seven-Up Bottling Co., supra, 344 U.S. at pp. 346-349; Amalgamated Utility Workers v. Consol. Edison Co., supra, 309 U.S. at pp. 265-266; Solo Cup Company v. N.L.R.B., supra, 332 F.2d at p. 449; Stewart Die Casting Corp. v. National Labor Rel. Board (7th Cir. 1942) 132 F.2d 801, 804; National Labor Relations Bd. v. Sunshine Mining Co., supra, 125 F.2d at p. 761.) In sum, enforcement of NLRB orders is an area which must be free from state regulation to leave national policy unhampered. (Richardson v. Kruchko & Fries, supra, 966 F.2d at p. 158.)

George's lawsuit effectively sought enforcement of the NLRB order and her ability to claim under that order. Enforceability of the NLRB order and Zlotoff's asserted liability to George for such order were issues at least colorably within the NLRB's exclusive jurisdiction.[4]

---

[4] Zlotoff's alleged refusal to comply with the NLRB order could constitute as much a violation of the NLRA as Aztec's original labor law violations. (Liberty Electronics Corp., etc. (1963) 143 N.L.R.B. 605, 617.)

Hence, we cannot say as a matter of law Zlotoff's assumption of Aztec's obligation under the NLRB order would be mere peripheral concern to the NLRA. (Farmer v. Carpenters (1977) 430 U.S. 290, 296-297.) Although pleaded as a claim for breach of contract on a third party beneficiary theory, George's complaint was in reality an attempt to enforce the NLRB order against parties who once were Aztec shareholders.[5]

---

[5] Contrary to George's contention, her complaint was preempted regardless of the capacity in which defendant Zlotoff wa sued. '[S]tate]-law claims are subject to Garmon preemption even when the defendant is neither a union, an employer, nor the employer's agent. Whether state-law claims are preempted under Garmon is determined not by the identity of the

party against whom the claims are asserted, but rather by the issues that those claims require a court to adjudicate. The dangers that Garmon doctrine seeks to avert -- 'the potential conflict of two law enforcing authorities, with the disharmonies inherent in two systems, . . . of inconsistent standards of substantive law and differing remedial schemes,' [citation] -- are present whenever courts are required to review conduct that is arguably prohibited or protected by the NLRA, no matter what the identity of the party against whom the state-law claims are asserted. Thus, . . . the identity of the party defendant is not determinative; a state-law claim is preempted 'if the conduct relied on to prove a crucial element in the state action is conduct that is arguably covered by the NLRA.' [Citations.]" (Richardson v. Kruchko & Fries, supra, 966 F.2d at pp. 156-157, italics in original.)

Enforcement of such obligation was outside the state court's power to adjudicate. (San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. at p. 243.) Despite George's artful pleading, her remedy if any was solely with the NLRB. Thus, George may not avoid preemption by framing her attempted enforcement of the NLRB order as a state law breach of

contract action. (Richardson v. Kruchko & Fries, supra, 966 F.2d at p. 158.)

2

As noted, in August 1990 the Union filed with the NLRB an unfair labor practice charge seeking to hold Zlotoff and others liable for remedying Aztec's unfair labor practices involved in the NLRB's 1982 and 1988 decisions on the theory they were either a continuation of Aztec, a successor employer, or both. The Unin requested the NLRB issue investigative subpoenas for various reasons including the provisions of the stock purchase agreement where Zlotoff became personally responsible for Aztec's debts as of December 31, 1986. In declining to issue a complaint on the Union's charge, the NLRB stated its investigation revealed insufficient evidence to conclude Zlotoff constituted an alter ego or disguised continuation of

Aztec.

George contends the NLRB's determination Zlotoff was not Aztec's alter ego or successor employer did not constitute a finding on Zlotoff's alleged separate and independent liability to George for breach of the stock purchase agreement. However, as noted, George's complaint was preempted regardless of the capacity in which Zlotoff was sued. (Richardson v. Kruchko & Fries, supra, 966 F.2d at pp. 156-157.) Further, although different parties were technically involved, George effectively had her "day in court" before the NLRB when that agency rejected the Union's August 1990 unfair labor practice charge. A claim virtually identical to the one before the superior court was the basis for the charge before the NLRB in August 1990. The NLRB determined Zlotoff was not liable under NLRA law for the earlier NLRB orders

against Aztec.[6]

---

[6] As noted, the Union raised before the NLRB the matter of the 1986 stock purchase agreement. Arguably the NLRB could apply state third party beneficiary law in determining the enforceability against Zlotoff of the NLRB order naming Aztec. (Liberty Electronics Corp., etc., supra, 143 N.L.R.B. at p. 617; see Sinko Manufacturing and Tool Company (1965) 154 N.L.R.B. 1474 and Emerson Electric Company (1969) 176 N.L.R.B. 744, where the NLRB also exercised its jurisdiction to decide claims seeking to enforce NLRB orders when under the language of Buy-Sell Agreements buyers allegedly agreed to assume liability for those orders.) Similar to those cases, Zlotoff's alleged liability arose from the sale of stock in a business where he agreed to assume responsibility for Aztec's existing liabilities.

George may not now relitigate the same claim in state court. Moreover, preemption by the NLRB's exclusive jurisdiction is particularly appropriate where, as here, the claim has been previously brought before the NLRB and then after rejection is recast as a state law claim. (Parker v. Connors Steel Co.,

supra, 855 F.2d at p. 1517.)[7]

---

[7] In Parker v. Connors Steel Co., supra, 855 F.2d 1510, the court stated: "We believe that the primary jurisdiction rationale has the greatest validity when a party has sought redress for his claims from the NLRB and in the face of an adverse decision the claims are restructured as state law claims and pursued in state court. [Citation.]" (Id. at p. 1517.) The court also stated: "By initially pursuing relief with the NLRB the employees have implicitly recognized the Board's jurisdiction over their claims." (Ibid.)

Finally, attempted enforcement through this state court lawsuit was preempted even though the NLRB declined to offer a remedy. (Richardson v. Kruchko & Fries, supra, 966 F.2d at p. 157.)[8]

---

[8] "[T]he Supreme Court has made clear that state-law claims may be preempted even when a plaintiff is without a remedy under the NLRA. See Guss v. Utah Labor Relations Bd., 353 U.S. 1 . . . (1957) (holding that state-law claims are preempted even when the NLRB refuses to assume jurisdiction). . . . That state law might provide remedies unavailable under the NLRA has never been a basis for avoiding Garmon preemption. [Citations.]"

(Richardson v. Kruchko & Fries, supra, 966 F.2d at p. 157.)

In sum, state court adjudication of George's complaint posed a danger of conflict with federal labor law as determined by the NLRB in rejecting the Union's August 1990 charge. By essentially asking the superior court to hear a claim the NLRB already rejected on the merits, George's state complaint potentially threatened interference with the national policy of industrial relations. (San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. at p. 243.) Permitting the superior court to assert jurisdiction over George's lawsuit would have required that court to exercise "power which might interfere with the policy behind preemption, i.e., the need to obtain uniform interpretation and application of federal labor law." (Balog v. LRJV, Inc. (1988) 204 Cal.App.3d 1295, 1308-1309.)

Further, only the NLRB itself -- no an individual employee -- may enforce an NLRB order. (Amalgamated Utility Workers v. Consol. Edison Co., supra, 309 U.S. at p. 265; Stewart Die Casting Corp. v. National Labor Rel. Board, supra, 132 F.2d at pp. 803-804; National Labor Relations Bd. v. Sunshine Mining Co., supra, 125 F.2d at p. 761.) Although George might properly contest the NLRB order, she had no individual standing to enforce that order in state court or otherwise. (Amalgamated Utility Workers v. Consol. Edison Co., supra, at p. 265; Steward Die Casting Corp. v. National Labor Rel. Board, supra, at p. 804.) Thus, again, permitting state court adjudication of George's complaint seeking enforcement of an NLRB back pay order would directly conflict and interfere with federal labor policy and the NLRB's exclusive jurisdiction over matters of compliance

and enforcement of its orders. Thus, the superior court may not interfere with national labor policy by permitting George's attempt to enforce in state court a back pay order of the NLRB.

IV

CONCLUSION

The premeption doctrine of San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. 236, applies to conduct or activity which is arguably protected or arguably prohibited by the NLRA. The preemption doctrine applies to George's complaint because her lawsuit essentially seeks enforcement of an NLRB order, a matter governed by the NLRA. Thus, the superior court properly concluded George's complaint was preempted as arguably within the jurisdiction of the NLRB. The superior court correctly granted judgment on the pleadings favoring Zlotoff.

DISPOSITION

The judgment is affirmed.

KREMER, P.J.

WE CONCUR:

TODD, J.

FROEHLICH, J.

APPENDIX B

B-1

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

HARLINE K. GEORGE, now known as HARLINE K. PROCHAZKA) Plaintiff	CASE NO. 632268 IC JUDGE: Robert J. O'Neill
v.	ORDER AND JUDGMENT ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
LEONARD ZLOTOFF and LOIS ZLOTOFF) Defendants	

The Motion of Defendants LEONARD ZLOTOFF and LOIS ZLOTOFF for judgment on the pleadings came on regularly for hearing by way of telephonic ruling before this Court on Friday, November 22, 1991, in Department 34, Honorable Robert J. O'Neill, Judge Presiding.

After full consideration of the Plaintiff's Complaint and the authorities

submitted by counsel, the Court ruled judicial notice taken as requested by both sides; Motion for Judgment on the Pleadings granted without leave to amend as Court finds the present action is arguably within the jurisdiction of the National Labor Relations Board; Defendants' request for attorneys fees and costs off-calendar as not adequately supported in the moving papers pursuant to CRC 313(b); case is dismissed in its entirety.

No party to the action timely requested oral argument on the Court's telephonic ruling of November 22, 1991.

IT IS THEREFORE ORDERED that the said Motion for Judgment on the Pleadings is granted, with prejudice, and that judgment is hereby entered in favor of Defendants LEONARD ZLOTOFF and LOIS ZLOTOFF, and against Plaintiff HARLINE K. GEORGE, now known as HARLINE K. PROCHAZKA.

[Handwritten text: "($17,510.50) Costs awarded defts Zlotoff $17,510.50"]

Dated: JAN - 6 1992

/s/_____
Robert J. O'Neill
Judge of the Superior Court

APPROVED AS TO FORM.

Dated: 12/31/91

/s/_____
Marilynn Mika Spencer
RICHARD D. PROCHAZKA, APC
Attorney for Plaintiff

APPENDIX C

C-1

Relevant Provisions of Section 29, United States Code

§152. Definitions

When used in this subchapter --

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organiation (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or

because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any

Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

. . .

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

. . .

§157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§158. Unfair labor practices.

(a) It shall be unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining

unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify and discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(emphases in original)

§160. Prevention of unfair labor practices -- Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less

than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.
(emphasis added)

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.